APPEAL NO. 93122

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on December 21, 1992, with the record closing on December 28th. The appellant, hereafter carrier, appeals hearing officer (hearing officer) determination that the respondent, hereafter claimant, also injured her left knee when she fell on (date of injury), contending that the decision is not supported by the evidence. The claimant disputes the carrier's recitation of certain facts in evidence, and asks that we affirm the hearing officer's decision.

The claimant also contends the carrier's request for review was not timely filed and was not served in person or by certified mail. We find the carrier's request for review to be timely. The hearing officer's decision was distributed on January 25, 1993. The 1989 Act provides that a party's written appeal shall be filed with the Appeals Panel no later than the 15th day after the date on which the hearing officer's decision is received from the Texas Workers' Compensation Commission's division of hearings. Article 8308-6.41(a). By rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5 (Rule 102.5), the receipt date is deemed to be five days after the date mailed. In addition, a request for review is presumed to be timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and received by the Commission not later than the 20th day after the date of receipt. Rule 143.3(c). The record shows that the carrier's appeal was postmarked February 11th and received by the Commission on February 16th. Pursuant to Rule 143.3(c), it was thus timely.

With regard to service on the opposing party, the Appeals Panel has held that failure to properly serve does not affect the timeliness of the appeal but rather extends the time for an opportunity for response until service is made. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. The record reflects that subsequent service by certified mail was effected upon the claimant.

DECISION

Upon review of the record in this case, we affirm the hearing officer's decision and order.

The claimant testified she was employed as a fast food unit supervisor with (employer) on (date of injury), when she slipped and fell on a greasy floor while carrying food from a salad bar. She was 52 years old at the time of the injury. She stated that she came down on both knees, but heavier on the right side, and hit her right arm and wrist on the shelf of a stainless steel table. Initially, she was most concerned about her arm, which began to swell immediately. She put ice on the arm, took aspirin, and called her supervisor, (Ms. S); however, she did not want to go to the emergency room because she could move her arm and did not believe it was broken.

The next day she said she went to Ms. S's office and showed her the arm, which was black up to the elbow, and her knees, which were also bruised. (At the hearing Ms. S said the claimant did not specifically tell her that she had injured her left knee, although during the following months she could tell the claimant was in pain.) The claimant stated that she filled out the employer's first report of injury, dated April 26th, which the carrier offered into evidence. On that form, she described how the accident happened as "walking through kitchen area - slipped on floor - fell and hit knee on floor - twisted knee and arm, in wrist area, hit bottom shelf of kitchen work table." The injury itself was described as "right knee twisted and most of weight hit on knee - wrist slammed against table. . . ."

On April 26th, she called and made an appointment with (Dr. B), an orthopedic surgeon. When she first saw Dr. B on April 30th she said he examined both knees and her arm, but that he was most concerned about her arm because of the discoloration. Because the right side of her body looked the worst, she said he x-rayed her right forearm/wrist, knee, and tibia/fibula. All x-rays were negative and Dr. B diagnosed multiple contusions. In a Report of Medical Evaluation Dr. B stated the claimant was last seen May 28, 1991 and that she had "essentially resolved her discoloration in all locations and is left with some soreness, essentially in the right wrist as would be expected. No major complaints." Dr. B found the claimant reached maximum medical improvement (MMI) on May 28th with a zero percent impairment rating. The claimant testified that she did not miss any time from work due to the injuries from her fall, although since her employer provided food services for a university she was off work during the summer of 1991.

The claimant continued working at her job, although she said she was in pain and was still taking anti-inflammatory medication. On March 10, 1992 she returned to Dr. B because of severe pain in her right knee. Dr. B ordered an MRI which disclosed a torn medial meniscus. The claimant underwent arthroscopic surgery on March 27th and thereafter began a course of physical therapy three times a week. The physical therapy progress notes contain reports about her right knee until June 15, 1992. On that date the report noted claimant's left knee "giving out on her yesterday and locking." Left knee pain was also reported by the physical therapist on June 17th, 18th, and 22nd; July 9th and 13th; and August 12th. The claimant said the physical therapy was terminated in September 1992 because the carrier would no longer pay for it.

On June 16, 1992 the claimant was seen by Dr. B, who wrote, "[t]he patient is now c/o a new problem, that of her left knee. She states that approximately 6/13/92 while at home standing and watering the yard, she began having increasing pain and decreasing ROM of the left knee." Dr. B also wrote, "[r]egarding the patient's left knee which apparently is not covered by her workman (sic) comp, although the patient states that she feels this is a direct result of the right knee workman (sic) comp injury. In my opinion, the left knee does not seem to be a direct result of the right knee and should not be considered a complication or tangential aspect in any way regarding her right knee problem." On June 24th,

subsequent to Dr. B's initial exam of claimant's right knee, the claimant had an MRI which also disclosed a torn medial meniscus. Surgery has been recommended but has not been performed.

In an October 13, 1992 letter to the Texas Workers' Compensation Commission Ombudsman, Dr. B recited the history of claimant's left knee problems, including its spontaneous onset in June, the fact that the claimant had never before mentioned a left knee problem, and the fact that the claimant specifically denied any history of trauma except for the injury of (date of injury). He also said he had told the claimant that her left knee problem was not secondary or the result of the right knee injury, but that "nevertheless, in order to verify any possible problem, the patient did undergo an MRI."

Dr. B continued, ". . . most often medical meniscal injuries have some basis in trauma. In view of lack of any other evidence to support trauma and in view of the patient's specific questioning and denial of history of any other trauma, the finding of a torn medial meniscus would seem to support the patient's claim that this injury of her left knee occurred on or about the same time of the injury to the right knee. Because of the finding on MRI and lack of any other trauma to which the patient admits, except for her original injury, this conclusion can conceivably be proposed, but not otherwise substantiated by facts present at this time. . . . Conceivably the medial meniscus could have been torn at the same time of her original injury. Further clarification of date of injuries or relation of her left knee injury to her initial injury can otherwise not be substantiated or evaluated."

Also made part of the record was a December 3, 1992 letter from Dr. G, who at carrier's request evaluated the claimant's medical records and concluded that ". . . etiology of this is quite speculative. . . . This is most likely an isolated incident occurring 6-13-92. In my opinion, it is very unlikely that this was related to her original injury."

The claimant conceded that she did not specifically inform her employer or her doctor about a discrete left knee injury until June of 1992. However, she said that her arm and right side contusions were of initial concern to herself and to Dr. B; that she was off work and living a sedentary lifestyle during the summer months following her injury; she did not fall or experience any other trauma to her knee except on (date of injury); she performs no strenuous activities and does not do yard work except for watering flowers; and that the left knee pain began to appear after she began physical therapy, when the exercises to strengthen her right leg put a strain on her left leg.

At the time of the hearing the claimant was continuing to work for employer as a cashier, in a job that largely allowed her to sit rather than to stand or walk.

In its appeal, the carrier alleges error in the hearing officer's determination that the claimant sustained no trauma to her left knee other than the fall on (date of injury), and that

claimant's left knee was injured in the course and scope of her employment on that date. The carrier contends that the claimant's credibility was impeached at the hearing, and thus her testimony regarding her injury is insufficient to support the hearing officer's findings. The carrier further contends that all objective evidence, most notably the reports of Dr. B and of the physical therapists, forces the conclusion that claimant did not suffer a left knee injury on April 25th. The carrier points out that it does not deny that the claimant incurred a torn medial meniscus in her left knee; however, it argues that the evidence does not support a determination that this injury occurred in the course and scope of her employment on April 25th.

It has been held that a claimant's testimony alone can establish the existence of a compensable injury, even when there is conflicting medical evidence. Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.). It is within the province of the hearing officer, as the finder of fact, to judge the credibility of witnesses, to assign the weight to be given their testimony, and to resolve any evidentiary conflicts and inconsistencies; the hearing officer also may believe all or part or none of the testimony of any one witness. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case, the claimant testified that her original injury was to both knees, but that the problems with the right side of her body were most apparent because of the greater discoloration and swelling. The medical evidence shows Dr. B shared this concern, as he only x-rayed her right knee, arm, and leg. He just as clearly did not pursue any injury other than her initial contusions, as no further studies were done and the doctor found her to have reached MMI with zero percent impairment about a month after her fall. Thereafter she did not see any doctor until the onset of pain in her right knee, which through further examination and studies proved to be the result of a torn medial meniscus, manifesting some nine months later. Following surgery and recovery, and during physical therapy wherein the claimant said her left knee was further stressed, she experienced the onset of an identical problem in the left knee, which was diagnosed in June of 1992.

Dr. B's October 13, 1992 letter, while stating only that the medial meniscus of claimant's left knee "conceivably" could have been torn at the time of her original injury, nevertheless stated claimant's condition was one most often based in trauma. The claimant consistently testified that she suffered no injury to her left knee other than the one occurring on April 25, 1992. While this certainly is a case whose facts could reasonably have admitted of a different conclusion, that is not a sufficient basis to reverse the decision and we cannot say upon review of the record that the hearing officer's decision was not supported by sufficient evidence of probative value. We will not overturn the hearing officer's decision unless it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge